No. 83-1635

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JEROME S. WAGSHAL,
Petitioner,

v.

CROZER-CHESTER MEDICAL CENTER and
UNIVERSITY OF SOUTHERN CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNIVERSITY OF SOUTHERN CALIFORNIA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an attorney may be awarded his fee directly against benefiting members of a plaintiff class who were not named in the suit and who had no formal notice of any pre-litigation retainer agreement.

2. Whether the determination that a party will not defend itself due to its minimal interest in the proceedings is a sufficient ground for refusing to certify that party as an "adequate" class representative under Rule 23, Fed. R. Civ. P.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District Columbia Circuit (Pet. App. 3a-20a) is reported at 717 F.2d 1451. The orders of the United States District Court for the District of Columbia denying jurisdiction to award attorneys' fees and refusing to certify the defendant class (set forth at Pet. App. 21a, 22a, 23a, 25a, 26a, and 29a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1983. A timely petition for rehearing was denied by the Court of Appeals on November 8, 1983. The Chief Justice extended the time for filing a petition for writ of certiorari to and including April 6, 1984. The petition for writ of certiorari was filed on April 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises from petitioner's long quest for attorneys' fees. In September 1973, a class action suit was brought against the Secretary of Health, Education and Welfare and others to secure the release of certain grant funds impounded in fiscal years 1973 and 1974. Petitioner was engaged by the National Association for Mental Health, Inc. ("NAMH"), the lead plaintiff, at an hourly fee of $35. In addition, NAMH agreed that petitioner would request the District Court to award reasonable attorneys' fees if the suit were successful. Named plaintiffs were informed of this fee arrangement. The University of Southern California, being an unnamed class member, received no notice of the fee arrangement.

The suit was successful, and petitioner subsequently filed an application for attorneys' fees to be paid either out of the unexpended grant funds or directly by the benefiting class members. The District Court granted petitioner reasonable attorneys' fees from the unexpended funds, but refused to exercise *in personam* jurisdiction over members of the plaintiff class. The Court of Appeals reversed the District Court's decision to grant attorneys' fees out of the unexpended fund. 717 F.2d 1451.

Petitioner then returned to the District Court and sued respondents, along with others no longer party to this action, both directly and as a class for reasonable attorneys'

fees. The District Court rejected petitioner's new argument, ruling that it lacked jurisdiction over the parties and that the defendant class could not properly be certified. The Court of Appeals affirmed. It stated: "Mr. Wagshal failed at the beginning of his efforts to attend to arrangements regarding his fees. We cannot alter that fact." Pet. App. 20a.

ARGUMENT

The decision of the Court of Appeals is correct, and further review is not warranted.

The cases on which petitioner relies do not conflict with the Court of Appeals' decision. *Boeing Co. v. VanGemert*, 444 U.S. 472 (1980), deals only with an award of attorneys' fees from an unclaimed portion of a common fund created by a judgment. Petitioner does not now seek such an award. Rather, petitioner seeks an award of fees directly against beneficiaries of the fund who were not named and consenting parties to any pretrial retainer agreement. Similarly, in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1938), *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *Trustees v. Greenough*, 105 U.S. 527 (1881), the Court held or suggested that individual plaintiffs who either explicitly or in effect protect the interests of a class may recover a portion of their expenses from the members of the class. None of these cases held, however, that an attorney may collect his fees directly from members of a benefiting class. Thus, the lower courts' concern with an attorney's ability to "conscript" clients was never addressed. Pet. App. 12a.

In *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), the Court addressed the issue of an attorney seeking his fee. The class members there, however, "had notice, by the bill, that the suit was brought, not exclusively for the benefit of the complainants therein, but

equally for those of the same class who should come in and contribute to the expenses of the litigation." *Id.* at 127. By contrast, the University of Southern California received no notice of the retainer agreement entered into by petitioner and NAMH.

Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979), does not support petitioner's position. In *Marcera* the Court of Appeals held that a defendant class can be certified even though the designated class representative does not wish to serve as class representative. "Rule 23(a)(4) does not require a willing representative but merely an adequate one." *Marcera*, 595 F.2d at 1231. In the present case, however, both courts below correctly determined that the respondents would *not* adequately represent the class. Pet. App. 17a. The Court of Appeals found that the University of Southern California would not even protect its own interest because its potential liability was so small (less than $1,000). Pet. App. 16a.

Petitioner has been pursuing legal fees in this matter for almost ten years. His persistence has already been particularly onerous for the University of Southern California. The University was never a party to any fee arrangement with petitioner, nor was it ever a named party or participant in the action for which petitioner now seeks to collect fees. Even though the University's fee exposure is less than $1,000 (Pet. App. 16a), it has already incurred substantial expenses due to petitioner's tenacious pursuit of attorneys' fees.

Petitioner's arguments have been carefully considered and properly rejected by the courts below. It is time to lay this matter finally to rest.

CONCLUSION

The petition for a writ of certiorari should be denied.

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June 1984.